

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Preserving the Open Internet

Broadband Industry Practices

)
)
)
) GN Docket No. 09-191
)

) WC Docket No. 07-52
)

REPLY COMMENTS OF THE DIGITAL ENTREPRENEURS

April 26, 2010

Introduction and Summary

Despite its international scope, the broadband Internet is uniquely American. It is a powerful platform for communications, entertainment, education, civic engagement and – perhaps most critically to minority “digital entrepreneurs” like ourselves – a path to realizing the American Dream of economic prosperity.

Yet one of the most persistent obstacles to realizing the American Dream is the ongoing inequity of economic opportunity that denies many people of color access to the tools of wealth creation. Although we may share the same talent, motivation and character as our non-minority counterparts, minority entrepreneurs still may find ourselves unable to obtain the same building blocks necessary to launch and, more critically, *expand* successful businesses. Thus, we cannot contribute fully to a rising economic tide that lifts all boats within our families, our communities, and our increasingly diverse nation overall.¹ For minority *Internet* businesses, this inability extends beyond lack of access to capital – an obstacle familiar from prior years. Our businesses also may suffer from being unable to obtain the technical capabilities *all* edge businesses need to provide content and applications that spur demand.

Based on our deep and personal understanding of the obstacles and opportunities minority businesses face, we applaud the Commission’s commitment to ensuring that consumers retain the freedom to access the applications, devices and legal content of their choice. We respectfully submit these Reply Comments, however, because we are deeply concerned that the Commission’s actions to preserve Internet “openness” may – perversely – *close* opportunities for

¹ See Les Christie, *Census: U.S. Becoming More Diverse*, CNNMoney.com (May 14, 2009) (http://money.cnn.com/2009/05/14/real_estate/rising_minorities/index.htm) (last visited Apr. 5, 2010) (stating that, according to the U.S. Census Bureau, the minority population in the United States reached 34% of the nation’s population on July 1, 2008, and that 44% of children under the age of 18 nationwide come from minority families).

minority Internet businesses. Specifically, the Commission's proposal to require broadband Internet service providers (ISPs) to serve all content and applications developers on a "nondiscriminatory" basis would prevent the emergence of critical strategic relationships between broadband ISPs and minority digital entrepreneurs and threaten digital entrepreneurs' ability to obtain technical capabilities to compete effectively against large content and applications providers, over both wireless and wireline networks.² In addition, the proposed rules would harm minority Internet businesses by shifting costs to consumers and thereby delaying broadband adoption efforts, which could hit minority businesses especially hard.

The Commission can play an important role in preserving the open Internet. Rather than adopting the proposed nondiscrimination rule, however, we urge the Commission to focus on: (1) minimizing the risk of anticompetitive conduct by promoting competition; (2) taking vigorous enforcement action to protect consumers against concrete harms; and, (3) employing a flexible approach that avoids unintended, adverse consequences for minority Internet businesses if the Commission decides that new rules are truly necessary.

² The NPRM suggests that, unlike other "nondiscrimination" rules, the proposed rule may prohibit business relationships whether or not they are made available to similarly situated customers. *See In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93, ¶ 106 (rel. Oct. 22, 2009) (hereinafter the "NPRM"). For simplicity, however, we use the Commission's own language in these Reply Comments, making the point that the Commission's attempt to prevent discrimination would harm minority businesses.

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I. THE PRIMARY OBSTACLES FACED BY MINORITY DIGITAL ENTREPRENEURS ARE KNOWN TO THE COMMISSION.

The obstacles to minority entrepreneurship are serious and well-documented. Chief among these is the difficulty minorities often face with respect to access to capital.³ Minority businesses often lack adequate start-up capital to enable them to grow and succeed, resulting in higher failure rates, lower sales and less employment in minority communities in which many of our businesses are located.⁴ Relative to whites, minorities receive less capital on less advantageous terms, even after accounting for factors such as education level, experience, industry and location.⁵ Latinos and African Americans are *three times* more likely than whites to be turned down for business loans, despite equivalent credit characteristics.⁶ This looming divide in access to capital means that minority-owned firms receive far less than our share of

³ See generally Robert W. Fairlie & Alicia M. Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, U.S. Dep't of Commerce, Minority Business Development Agency (Jan. 2010) (download available at: http://www.mbda.gov/?section_id=6&bucket_id=16&content_id=6469&well=entire_page) (last visited Apr. 5, 2010).

⁴ See, e.g., Alicia Robb & Robert Fairlie, *Access to Financial Capital Among U.S. Businesses: The Case of African American Firms*, 613 ANNALS AM. ACAD. POL. AND SOC. SCI. 195, 196 (2007).

⁵ Glenn Yago *et al.*, *A History of Emerging Domestic Markets*, 3 COMM. INV. DEV. REV. 1 (2007) (<http://www.frbsf.org/publications/community/review/062007/yago.pdf>) (last visited Apr. 5, 2010).

⁶ Glenn Yago & Arron Pankratz, *The Minority Business Challenge*, Milken Institute and U.S. Dep't of Commerce (2000), (<http://www.mbda.gov/documents/democratizing.pdf>) (last visited Apr. 5, 2010).

capital.⁷ These stark facts have been made plain to the Commission in filings, workshops and speeches as it developed the National Broadband Plan.⁸

The government has attempted to help bridge the minority capital divide.⁹ These efforts, however, have not prevented minority entrepreneurs from falling behind our counterparts with respect to revenues, numbers of employees and other measures.¹⁰ Although minorities make up roughly one-third of the U.S. population,¹¹ minorities own only about 18% of U.S. firms.¹² On average, for every dollar earned by a white-owned firm, minority-owned firms made 43 cents.¹³

These disparities are likely to be exacerbated by the same global communications and information technologies with which the Commission is so familiar.¹⁴ Global competitiveness further threatens minority businesses because of our relatively small scale and weak strategic

⁷ See generally *id.* (estimating that minorities comprise 8% of owner firms but receive less than 2% of venture capital); Fairlie & Robb, *supra* n.3, at 5-6.

⁸ See, e.g., National Broadband Plan Workshop, “Capitalization Strategies For Small and Disadvantaged Businesses” (Nov. 12, 2009) (transcript available at: http://broadband.gov/docs/ws_capitalization_strategies/ws_capitalization_strategies_transcript.pdf) (last visited Apr. 5, 2010); FCC Commissioner Robert McDowell, Speech at the National Broadband Plan Workshop, “Capitalization Strategies For Small and Disadvantaged Businesses” (Nov. 12, 2009); *In the Matter of A National Broadband Plan for Our Future*, GN Docket No. 09-51, Initial Comments of The Broadband Diversity Supporters, at 31 (June 8, 2009).

⁹ See, e.g., Ying Lowrey, U.S. Small Business Administration, Office of Economic Research, Office of Advocacy, *Minorities in Business: A Demographic Review of Minority Business Ownership*, at 2 (April 2007) (noting higher percentages of Black- and Native-American-owned employer businesses using business loans from the government or government-guaranteed bank loans).

¹⁰ See Fairlie & Robb, *supra* n.3, at 4.

¹¹ See Christie, *supra* n.1.

¹² See, e.g., Lowrey, *supra* n.9, at 1.

¹³ *Id.*

¹⁴ See Fairlie & Robb, *supra* n.3, at n.68.

prospects.¹⁵ Minority-owned businesses are overrepresented in slow growth sectors of the economy, such as personal services, retail and food service.¹⁶ As revealed by a recent study by the Ewing Marion Kauffman Foundation, the consequences for small and low-growth minority businesses are increasingly dire:

[B]usinesses that won't or don't make transformative changes to close the gap will ultimately fail. The growth rate for these firms will begin to slow, and a limited number of jobs will be created within our society.¹⁷

To prevent this dire outcome, the study recommends several proactive steps, including:

- Strengthening the representation of minority-owned businesses within higher growth sectors such as those relating to the Internet and other information technologies;
- Expanding the use of strategic partnerships; and
- Exploiting information technology to improve product differentiation and profit margins.¹⁸

As experienced minority digital entrepreneurs, we can attest that the same obstacles and imperatives faced by minority businesses generally also are present in the dynamic but all too homogeneous Internet industry. The Internet offers enormous promise to minority businesses by lowering entry barriers, helping us reach distant markets and instilling hope that our businesses eventually can grow at “Internet speed” – thereby breaking the cycle of low growth among the vast majority of minority businesses. Our optimism is further buoyed by the reality that

¹⁵ *See id.* at 8.

¹⁶ *See* Lowrey, *supra* n.9, at 1-2; Jodi Helmer, *The Future of Minority-Owned Businesses in America*, Journal of EDM Finance, at 40 (2005).

¹⁷ *The New Agenda for Minority Business Development*, at 2, The Boston Consulting Group (2005) (http://www.kauffman.org/uploadedfiles/minority_entrep_62805_report.pdf) (last visited Apr. 5, 2010).

¹⁸ *Id.* at 2, 30.

minorities will comprise a growing percentage of the U.S. population, as well as by our hope that, increasingly, minority consumers will get online and support our businesses.¹⁹

We have seen first-hand, however, how inadequate access to capital, lack of scale and technical disadvantages can doom minority Internet businesses. As with the priority the FCC has identified with respect to fostering adoption and inclusion in the use of the broadband Internet,²⁰ our nation also must tackle the imperative of ensuring that the Internet advances minority entrepreneurship, rather than widening the existing divide. To be sure, achieving this vision will require the Commission, in its oversight of the Internet, to remain vigilant against abusive practices targeting minority Internet businesses, such as disparities in lending to these businesses. The Commission, however, also must ensure that its actions “do no harm” to minority Internet businesses.

At a minimum, the Commission must not inhibit the types of affirmative actions called for by the Kauffman Foundation study and our own personal experiences, as these actions can help compensate for the serious disadvantages faced by minority Internet businesses. *First*, the Commission must not impede minority Internet businesses from forging strategic relationships that can help them achieve the scale and scope necessary to survive and thrive in an increasingly global marketplace, thereby also mitigating the effects of minorities’ more limited access to capital. *Second*, the Commission must not chill efforts by minority Internet businesses to take

¹⁹ See Jon P. Gant, *et al.*, *National Minority Broadband Adoption: Comparative Trends in Adoption, Acceptance and Use*, at 8, Joint Center for Political and Economic Studies (2010) (stating that the level of Internet use has dramatically increased in the United States since 2000 across all racial and ethnic groups) (http://www.jointcenter.org/publications1/publication-PDFs/MTI_BROADBAND_REPORT_2.pdf) (last visited Apr. 5, 2010).

²⁰ See FCC, *Connecting America: The National Broadband Plan*, at 168 (Mar. 2010) (available at <http://www.broadband.gov/plan/>) (last visited Apr. 5, 2010) (hereinafter the “National Broadband Plan”).

advantage of the most effective technologies for serving customers effectively with high-value (and more profitable) product offerings. We fear that the Commission is poised to violate these two principles.

II. THE PROPOSED STRICT NONDISCRIMINATION RULE WOULD HARM MINORITY EDGE BUSINESSES.

Despite our support for a strong government role in preserving an open Internet, our experiences as minority digital entrepreneurs leads us to have grave concerns regarding the approach proposed in the *Open Internet NPRM*. In particular, the proposed strict nondiscrimination rule under consideration would directly undermine the ability of minority businesses to forge strategic relationships with major broadband ISPs.²¹ As discussed more fully below, these relationships can help compensate for inadequate access to capital and other impediments to achieving the scale and scope these businesses need to compete domestically and globally. Relatedly, the proposed nondiscrimination rule would impede minority Internet businesses from fully exploiting the technical capabilities necessary to bring these businesses, and the communities we serve, to a higher level of sustainability and wealth generation.

A. The Strict Nondiscrimination Rule Would Discourage Critical Strategic Relationships Between Broadband Providers and Minority Digital Entrepreneurs.

The proposed rules state:

Subject to reasonable network management, a provider of broadband Internet access must treat lawful content, applications and services in a *nondiscriminatory* manner.²²

²¹ In this context, “discrimination” refers not to unfair and inherently denigrating or abusive behavior, as in the civil rights context. Rather, “discrimination” is a term of art commonly used in public utility regulation, describing how a local telephone company or other “common carrier” is treating others (often competitors) in commercial matters.

²² NPRM ¶ 104, App. A § 8.13 (emphasis added).

As further elaborated in the *Open Internet NPRM*, the proposed rule would prohibit broadband ISPs from providing “enhanced” or “prioritized” access to application and content providers.²³ Importantly, the *Open Internet NPRM* fails to define in any way the terms “enhanced,” “prioritized,” or even “content or application provider.” Accordingly, the rule would appear to forbid broadband providers from offering quality guarantees on any terms to virtually any potential customer. Although the proposed rule makes an exception for “reasonable network management,” that term is decidedly ambiguous and likely will remain so for months and years as this term is litigated.²⁴

More importantly from our perspective, neither the proposed nondiscrimination requirement nor the proposed definition of reasonable network management makes any allowance for the many pro-competitive strategic relationships between broadband ISPs and minority content and applications developers that could prove mutually beneficial to the ISP and to the minority business. These relationships could include discounted or otherwise favored marketing arrangements, agreements to bundle the two companies’ products, equity and credit arrangements or other agreements to share economic, technical and other resources with minority Internet businesses. Such arrangements can both strengthen minority Internet businesses and benefit the ISP’s customers with more diverse and innovative content and applications. These relationships, particularly when coupled with mentoring and the exchange of operational insights, mirror the package of services made available to emerging businesses in the context of

²³ *Id.* ¶ 106.

²⁴ In addition to inevitable court appeals regarding this term, the FCC itself has signaled that it will identify prohibited conduct gradually over time through case-by-case application of the proposed rules. *See, e.g., id.* ¶¶ 12, 110, 134, 175.

“business incubator” programs.²⁵ A strict nondiscrimination requirement would discourage broadband ISPs from forming such relationships, lest they open themselves up to legal challenge by other content and applications providers claiming that such relationships are discriminatory and thus prohibited.

History leaves little doubt that strategic relationships between non-minority and minority firms are attractive to both firms and can be key ingredients in minority firms’ success. Black Entertainment Television (BET) was founded by Robert Johnson based, in part, on equity financing from then-cable giant TCI, which sought to expand its profile with African American and urban cable customers.²⁶ Essence Communications, by partnering with Time Warner, dramatically improved its financial strength, distribution network and advertising relationships.²⁷ TV One, which targets African American cable viewers, got its start based, in part, on support from multichannel video network provider Comcast.²⁸

These examples illustrate how strategic relationships with more established firms can be a powerful tool for launching successful minority businesses that, in turn, build wealth and economic opportunity for both founders and for minority communities generally. Moreover, our experience as minority digital entrepreneurs convinces us that interest in such strategic

²⁵ See Emily Maltby, *Need Funding? Better Get Creative*, Wall Street Journal (Oct. 15, 2009) (describing business incubator programs): (http://online.wsj.com/article/SB10001424052748703790404574471433151548294.html?mod=wsj_share_digg) (last visited Apr. 4, 2010).

²⁶ See BET Holdings, Inc., FundingUniverse.com: (<http://www.fundinguniverse.com/company-histories/BET-Holdings-Inc-Company-History.html>) (last visited Apr. 1, 2010).

²⁷ See *The New Agenda for Minority Business Development*, *supra* n.17, Exhibit 19.

²⁸ See Press Release, “TV One, New Network Targeting African American Adults, Will Launch on Dr. Martin Luther King, Jr. Holiday” (Jan. 16, 2004).

relationships likely will grow over time. Particularly as efforts by the Commission and others to get more minorities to adopt broadband accelerate, major ISPs will face increased incentives to nurture minority businesses that can attract those new customers.²⁹

These deals between minority entrepreneurs and ISPs, however, will *not get done* if new regulation increases the legal risks to ISPs associated with making such deals. The proposed nondiscrimination rule would do just that. The strategic relationships discussed above underscore this point. If government had subjected companies like TCI, Time Warner, Comcast and DirecTV to a similarly broad nondiscrimination requirement that forced them to treat all cable programmers and magazines equally, the deals that made BET, Essence and TV One such successful companies would almost surely never have occurred. Commenters in this proceeding have raised similar concerns about the proposed rule stifling beneficial partnerships between broadband ISPs and smaller content and applications companies.³⁰

The seriousness of this issue is compounded by the shift from traditional media, in which some strides have been made in promoting diverse ownership, to the Internet space. Simply put, minority individuals need every tool at our disposal in making inroads into the ranks of successful Internet business people, and strategic partnerships with broadband ISPs and other non-minority firms is another such tool. In our view, this is reason enough for the Commission to think twice before adopting the proposed nondiscrimination requirement.

²⁹ See National Broadband Plan at 171; Gant, *et al.*, *supra* n.19, at 1 (reporting that minority groups, among others, are among the fastest growing groups of broadband adopters, and that higher income minorities are also more likely to embrace online content and applications to improve their quality of life and facilitate connections with others online).

³⁰ See, e.g., Comments of Verizon and Verizon Wireless at 67 (describing success-based pricing formulas such as revenue sharing arrangements between ISPs and application and content providers); Comments of AT&T Inc. at 106-07; Comments of CTIA at 45 (describing the new and innovative business models introduced in the pre-paid wireless world).

B. The Nondiscrimination Rule Would Threaten Minority Entrepreneurs' Ability to Obtain the Technical Capabilities to Compete Effectively Against Large Content and Applications Providers, Over Both Wireless and Wireline Networks.

The proposed rules also would hamper the ability of minority businesses to exploit fully the technical capabilities we need to compete and thrive domestically and internationally. Specifically, a strict nondiscrimination requirement would prevent minority businesses from contracting with broadband ISPs for quality of service and other enhancements they will need to attract new customers and keep pace with competing applications and content developers.

As the Commission acknowledges in the *Open Internet NPRM*, the “best efforts” nature of the Internet disfavors applications that are sensitive to data issues such as latency.³¹ These applications include voice applications, gaming and streaming video, which may be especially attractive to minority businesses seeking to draw slow- and non-adopters onto the Internet.³² Minority content and applications developers also may have a strong interest in obtaining assistance from ISPs in optimizing our offerings, such as by using content distribution networks (CDNs), collocation of equipment and virtual private networks (VPNs).³³

The need for the most advanced technical capabilities may be especially critical to the extent minority Internet businesses seek to reach customers through wireless services and devices. As the Commission itself acknowledges and the record underscores, the unique

³¹ See NPRM ¶ 13; see also Comments of the Information Technology and Innovation Foundation at 24.

³² See, e.g., Gant, *et al.*, *supra* n.19, at 39 (reporting that African Americans and Hispanics are more likely than whites to access the Internet over alternative broadband-enabled devices, such as iPods and game consoles).

³³ See Comments of AT&T Inc. at 111-12; Comments of Comcast Corporation at 40-41.

capacity constraints of wireless broadband often pose additional technical challenges.³⁴ Wireless broadband nonetheless will be an important entry point and driver for minority adoption.³⁵ Consequently, minority entrepreneurs who seek to serve this new demand will face even greater incentives to bolster our technical capabilities, which could include obtaining quality of service and other technical capabilities from wireless broadband providers.

Regardless of the broadband technology at issue, the proposed nondiscrimination requirement would frustrate efforts by minority entrepreneurs to negotiate valuable technical capabilities with ISPs. This outcome would put these minority Internet businesses at a stark disadvantage relative to Google and other large content and applications companies that can provide similarly enhanced capabilities without the ISP's help (*e.g.*, by providing these functionalities in-house).³⁶

This last point underscores the reality that minority digital entrepreneurs' chief competitors are *not* broadband providers. For broadband providers – like the cable providers that supported the development of BET and TV One – have strong incentives to attract increasingly diverse content and thereby attract more customers to help pay for costly network investments.³⁷ Rather, minority entrepreneurs' chief rivals in the Internet space are the well-established content

³⁴ Wireless broadband services are constrained by limited and dynamically changing radio spectrum conditions shared among multiple users. As such, wireless providers must take extra precautions to meet consumer demand and service quality expectations. *See* Comments of Alcatel-Lucent at 27; Comments of George Ou at 3; Comments of the Information Technology and Innovation Foundation at 27.

³⁵ Gant, *et al.*, *supra* n.19, at 4-5.

³⁶ *See* National Organizations Comments at 28-32; Comments of AT&T Inc. at 137-40.

³⁷ *See* Comments of the Information Technology and Innovation Foundation at 15-16; Gerald R. Faulhaber & David J. Farber, *The Open Internet: A Consumer-Centric Framework*, 4 INT'L J. COMM. 302, 320 (2010) (<http://ijoc.org/ojs/index.php/ijoc/article/view/727/411>) (last visited Apr. 4, 2010).

and applications providers. Because of their long head start, they are more likely to offer competing services and may enjoy considerable technical and other advantages over minority digital entrepreneurs.³⁸

No matter what level of rivalry exists between minority Internet businesses and large content and applications developers, it is clear that the former companies are much less likely to have the scale to provide the quality of service and other technical capabilities they could freely negotiate in the absence of the proposed strict nondiscrimination requirement.

III. THE PROPOSED RULES ALSO WOULD HARM MINORITY INTERNET BUSINESSES BY SHIFTING COSTS TO CONSUMERS AND THEREBY DELAYING BROADBAND ADOPTION EFFORTS.

The proposed strict nondiscrimination requirement would harm minority digital entrepreneurs in another way. The proposed rule would adversely affect one of our most promising market segments: minority consumers. We recognize that, despite our eagerness for minority businesses to expand into all facets of Internet commerce, our “anchor” market in many cases will be comprised of minority consumers, a reality borne out by our own business plans.³⁹ By precluding payments to ISPs from application providers and other edge businesses, the

³⁸ See Jon Nocera, *Stuck in Google's Doghouse*, The New York Times (Sept. 12, 2008) (<http://www.nytimes.com/2008/09/13/technology/13nocera.html>) (last visited Apr. 4, 2010); Michael Arrington, *Of Course You'll Keep Developing for the iPhone*, TechCrunch (Sept. 14, 2008) (available at <http://techcrunch.com/2008/09/14/of-course-youll-keep-developing-for-the-iphone/>) (last visited Apr. 4, 2010); Adam Raff, *Search, But You May Not Find*, The New York Times (Dec. 27, 2009) (http://www.nytimes.com/2009/12/28/opinion/28raff.html?_r=2) (last visited Apr. 4, 2010); John Lettice, *Antitrust Incoming? Google Hit by EU Complaint, FCC Filing* (http://m.theregister.co.uk/2010/02/24/google_antitrust_incoming/) (last visited Apr. 4, 2010).

³⁹ For instance, Navarrow Wright of Maximum Leverage Solutions, one of the signatories to these reply comments, has co-founded a social media website catering to the hip-hop perspective, Global Grind.com. Deanna Sutton of Sutton New Media, another signatory, publishes Clutch Magazine, which is one of the leading online magazines for multicultural women ages 18-34.

proposed rules would leave end-user consumers as the sole source of revenue to support broadband deployment. This would necessarily drive up consumer broadband prices, undermining efforts to improve national broadband adoption.

The National Broadband Plan set a bold but visionary goal of connecting 100 million Americans to 100 Mbps broadband service by 2010.⁴⁰ As the Plan acknowledges, adoption is a bigger barrier to achievement of this goal than deployment,⁴¹ and cost is the most common reason consumers choose not to subscribe to broadband.⁴² Thus, to avoid impeding its own adoption goals, the Commission should not impose regulations on the Internet that will needlessly increase consumer broadband prices.

Business models that spread costs throughout the system are common in other areas of commerce and economists view these arrangements as efficient. Most parties now recognize that the Internet supports a variety of what economists call “two-sided markets,” with subscribers on one side and application/content providers on the other side.⁴³ “[T]here are many business models where costs are shared by multiple parties who benefit” and there is no reason to believe that there is any dysfunction in such models.⁴⁴ As a result, it is a “misleading characterization of

⁴⁰ National Broadband Plan at 9 (Goal No. 1).

⁴¹ Indeed, broadband has already been deployed to 95% of Americans’ housing units, but only two-thirds of Americans subscribe. *Id.* at 20, 23.

⁴² *Id.* at 168. *See also, e.g.*, National Black Caucus of State Legislators *et al.* Comments at 7-10 (affordability concerns are key to achievement of minority adoption goals); National Organizations Comments at 14 (same).

⁴³ *See, e.g.*, Faulhaber & Farber, *supra* n.37, at 319.

⁴⁴ Jon M. Peha, *The Benefits and Risks of Mandating Network Neutrality, and the Quest for a Balanced Policy*, 1 INT’L J. OF COMM. 644, 658 (2007) (<http://www.ijoc.org/ojs/index.php/ijoc/article/view/154/90>) (last visited Apr. 5, 2010); *see also, e.g.*, Declaration of Marius Schwartz, Ph.D., at 16-19 (Exh. 3 to Comments of AT&T Inc.).

the network neutrality issue” to view payments to network operators from applications providers and other edge businesses as inherently problematic or uneconomic.⁴⁵

Economic research strongly suggests that a strict nondiscrimination principle, as proposed in the *Open Internet NPRM*, would eliminate a potential revenue stream for network operators and therefore raise prices for consumers. The Commission acknowledges some of this research in the *NPRM*,⁴⁶ and this concern is reflected in the initial comments as well.⁴⁷ Not surprisingly, advocates for the most price-sensitive users and those least likely to subscribe to broadband today – such as minorities and people with disabilities – are most concerned about this unintended consequence of the proposed regulations. For example, the National Organizations (sixteen civil rights groups) argue that “[f]orcing end users to bear the entire costs of broadband networks and thus pay higher prices for broadband offerings would negatively impact broadband adoption and either cement or widen the digital divide.”⁴⁸ This is a powerful argument against rigid network neutrality regulation.

Another advantage of permitting application providers and other edge businesses to pay for prioritization and other services is that it allows network costs to be recovered efficiently from high-volume uses of the network. As FCC Chief Technologist Jon Peha previously observed, “[t]here are several ways in which application performance objectives may differ, and network ... pricing ... should reflect these differences.”⁴⁹ In contrast, flat-rate pricing models do

⁴⁵ Peha, *supra* n.44, at 657-59.

⁴⁶ *NPRM* ¶ 165 & n.153.

⁴⁷ *See, e.g.*, Comments of CenturyLink at 7; Comments of Cisco Systems, Inc. at 6; Comments of PAETEC Holding Corp. at 15.

⁴⁸ Comments of the National Organizations at 16.

⁴⁹ Jon M. Peha, *Scheduling and Admission Control for Integrated-Services Networks: The Priority Token Bank*, 31 *Computer Networks: The International Journal of Computer and* (continued on next page)

not allocate costs efficiently, leaving lower-volume users with the same burden of sustaining the network as higher-volume users.⁵⁰ While high-volume users (whether consumers or edge businesses) are likely to remain on the network even if they are required to pay for the additional burden they place on the network, lower-volume consumers – the users on whom the FCC’s adoption concerns are focused – are much less likely to subscribe in the face of price pressure.

In sum, the economic literature and the record in this proceeding reflect a strong concern that a strict nondiscrimination rule would preclude payments from application providers and other edge businesses to network operators, foreclosing an important revenue stream and imposing unnecessary cost burdens on consumers. This will undermine the Commission’s national adoption goals, with the most significant impacts on the most vulnerable populations and on the minority and other businesses seeking to serve them. The Commission’s “data-driven” analysis in this proceeding must account for this significant factor militating against rigid network neutrality regulations.

IV. EVEN IN THE ABSENCE OF THE PROPOSED NONDISCRIMINATION REQUIREMENT, THE COMMISSION CAN PLAY IMPORTANT ROLES IN PRESERVING AN OPEN INTERNET.

Despite our concern that the proposed nondiscrimination requirement would harm minority digital entrepreneurs, nothing in these Reply Comments should be misconstrued to suggest that we see no role for the Commission in these matters. We applaud the Commission’s commitment to ensuring that consumers’ freedom to access the applications, devices and legal

Telecommunications Networking 23, 24 (1999) (<http://www.ece.cmu.edu/~peha/bank.pdf>) (last visited Apr. 5, 2010).

⁵⁰ See, e.g., Federal Trade Commission, *Broadband Connectivity Competition Policy* (Staff Report), at 158 (2007).). This point should be obvious to everyone who has driven across the Chesapeake Bay Bridge. The base automobile toll is \$2.50 while a 6+ axle semi-trailer pays \$18 – as it should, given its impact on road maintenance costs. See <http://www.mdt.maryland.gov/TollRates/baybridge.html> (last visited April 5, 2010).

content of their choice. We recognize that this freedom will remain essential to enabling minority and other businesses to innovate and invest in ways that enhance the relevance and value proposition among minority consumers that will be critical in persuading lagging minority broadband adopters to get online. Thus, we strongly support the Commission's leadership in setting an overall policy direction that insists on the preservation of an open Internet. As the last section suggests, moreover, we strongly support the Commission's emphasis on promoting broadband adoption and digital literacy among minorities and others who have been slower to get online.⁵¹

There are three additional areas in which we encourage the Commission to focus its energies: promoting competition and innovation; vigorous enforcement; and, if the Commission decides it must adopt some rule, adopting a rule flexible enough to minimize the harms to minority Internet businesses that the proposed nondiscrimination requirement would inflict.

A. Promoting Competition Will Help Preserve an Open Internet by Minimizing the Risk of Anticompetitive Conduct.

In lieu of imposing a nondiscrimination requirement, the Commission should focus its efforts on (1) encouraging innovation and competition among networks, devices and applications, consistent with the goals of the National Broadband Plan;⁵² and (2) promoting transparency by stakeholders operating in the Internet value chain. This approach, in combination with vigilant policing of the Internet ecosystem by the Commission and tech-savvy elements of the online community, could supplant the need for a comprehensive set of open

⁵¹ See National Broadband Plan at 171.

⁵² *But see* Comments of the Information Technology and Innovation Foundation at 20 (suggesting that a broad competition analysis should be undertaken in any event, but that there is little or no evidence to suggest that current markets are not competitive).

Internet regulations, at least in the near term.⁵³ Ensuring that viable competition exists between numerous providers, including (but not limited to) wireline and wireless broadband access providers at the “physical” level of the Internet, would deter unreasonable and anticompetitive conduct because stakeholders engaging in such conduct would risk alienating their customers and losing them to their rivals.

This pro-competitive policy would encourage minority-owned businesses to experiment with innovative business opportunities, including business incubation and creative distribution deals. Although the Internet marketplace has matured over the past decade, numerous minority-owned Internet startups are launched each year. These start-ups have increasingly diverse requirements for network performance. We share in the concerns expressed by commenters who argue that regulation of today’s technologies could chill market experimentation,⁵⁴ and could otherwise impede start-ups with innovative business models and technologies from entering the market.⁵⁵ Should a business model develop that appears to be anticompetitive,⁵⁶ it should be

⁵³ See Faulhaber & Farber, *supra* n.37, at 309 (stating that “tools are widely available on the Internet to actively monitor ISPs’ network practices,” and adding that the “universe of watchful customers and the sophistication of the monitoring tools available to them is rapidly expanding.”).

⁵⁴ See Comments of American Consumers Institute Ctr. of Citizen Research at 15-16; Comcast Comments at 38-39; Communications Workers of America Comments at 23; MetroPCS Comments at 27; Verizon Comments at 52 (“Network providers need breathing room to experiments and try new approaches.”).

⁵⁵ See Comments of the National Organizations at iii.

⁵⁶ See, e.g., Bright House Networks Comments at 10; CenturyLink Comments at 16; Clearwire Comments at 11; Comcast Comments at 42-43; Information Technology Industry Council Comments at 5-7.

reviewed by the Commission on a case-specific basis,⁵⁷ but to effectively bar creative business models only promises to stifle innovation and competition across the broadband ecosystem.

The Commission also should consider taking steps to eliminate information asymmetries and protect consumers in the Internet ecosystem through greater transparency, which empowers customers to make informed decisions about their contractual relationships. As the ITIF has pointed out, regulators in Canada and the European Union have recently concluded that the appropriate emphasis of Internet regulation (at least in the short-term) should be on consumer disclosure of Internet access services, and not sweeping restrictions on specific network management practices or business models.⁵⁸ We support the views of commenters who identify the need for greater transparency.⁵⁹ To fully empower customers, disclosure requirements should be extended to all Internet firms serving retail customers, and these firms should inform their customers of the capabilities, limitations, network management and privacy practices of their respective service in plain English, subject to certain reasonable exceptions.⁶⁰ The Commission should promote “cooperative” or “co-regulatory” solutions to disclosure issues in the first instance to “devise common terminology and metrics to enable consumers to make simple, apples-to-apples comparisons between various service offerings.”⁶¹

⁵⁷ See *Madison River Commc'ns LLC*, Order 20 FCC Rcd 4295 (2005); *Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

⁵⁸ Comments of the Information Technology and Innovation Foundation at 3.

⁵⁹ See, e.g., *id.* at 25; Google and Verizon Joint Submission at 3; Internet Innovation Alliance Comments at 6.

⁶⁰ See, e.g., Comments of Bright House Networks at 10-11; Comments of the Center for Democracy & Technology at 32-35 (acknowledging that there should be different transparency requirements for congestion management versus security, which would require less detailed disclosure).

⁶¹ See Comments of the Information Technology and Innovation Foundation at 25.

B. Vigorous Enforcement Can Protect Consumers Against Concrete Harms.

Just as we believe government must stamp out the well-documented patterns of discriminatory lending that have plagued minority businesses, we believe that government must intervene aggressively to remedy anticompetitive behavior that threatens consumers. Accordingly, we align ourselves with those who have advocated this approach previously, including members of the current Administration.⁶² Our collective experience as minority digital entrepreneurs persuades us that this emphasis on strong enforcement against concrete harms may be all that is necessary at this time to ensure that minority businesses, and the consumers we serve, continue to deepen our involvement with the Internet and enjoy the expanding economic and social benefits that a vibrant and open Internet offers.

C. The Imperative to “Do No Harm” to Minority Internet Businesses Favors a Flexible Approach.

Should the Commission determine that it must go further to adopt new rules in this proceeding, we urge the Commission to implement flexible rules that focus on concrete harms to consumers, while minimizing the risk of unintended, adverse consequences. Thus, for example, we do not oppose the Commission adopting prohibitions against unreasonable, unjust and/or anticompetitive behavior. If applied flexibly, and focused on concrete rather than speculative harms, such an approach could allow businesses large and small to create innovative business models, while protecting everyone in the Internet ecosystem from unjust, anticompetitive treatment. A flexible approach could be especially beneficial for minority Internet businesses relative to adoption of the proposed nondiscrimination requirement. In particular, adopting a

⁶² See, e.g., Robert D. Atkinson & Philip J. Weiser, *A Third Way on Network Neutrality*, 13 The New Atlantis 47 (2006) (<http://www.thenewatlantis.com/publications/a-third-way-on-network-neutrality>) (last visited Apr. 1, 2010).

rule that encourages the Commission to examine the reasonableness of broadband ISPs' relationships with minority content and applications providers could further the Commission's goals of promoting broadband adoption, innovation and ensuring that the full benefits of the broadband Internet extend to all Americans.⁶³

Conclusion

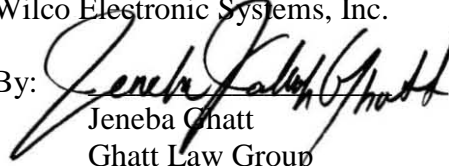
By requiring identical treatment, the government can contribute to unequal results. This is especially true, as in the case of minority digital entrepreneurs, where equal treatment merely reinforces the reality that some individuals start the race several steps behind other runners. Notwithstanding the obstacles we face, we firmly believe that minority Internet businesses can succeed in ways that surpass what we could accomplish with respect to traditional media. To realize this goal, however, the Commission will need to remain vigilant that its well-intentioned policies do not inadvertently hold us back. Accordingly, we urge the Commission not to adopt the proposed, inaptly-named nondiscrimination requirement and to focus instead on promoting competition and innovation, vigorously policing concrete harms against consumers and, if it must adopt new rules, doing so flexibly and in a way that does not block our efforts to achieve the American Dream.

⁶³ See National Broadband Plan at 19-21; 47 U.S.C. § 157 nt. (Section 706 of the Telecommunications Act of 1996).

Respectfully submitted,

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CoLours TV
Grain Communications Group
HPP Productions
Maximum Leverage Solutions
Native American Public Telecommunications, Inc.
PowerTeam1, LLC
Ronson Network Services Corp.
Semantic Labs, LLC
Sutton New Media
The Aquiline Group, Inc.
ThinkSmartNow
Tyler New Media
Wilco Electronic Systems, Inc.

By:

A handwritten signature in black ink, appearing to read "Jeneba Ghatt", written over a horizontal line.

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